

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ART+COM INNOVATIONAL POOL : CA NO. 14-217-RGA
GmbH, :
:
Plaintiff, :
:
v. : May 19, 2016
:
GOOGLE INCORPORATED, :
:
Defendant. : 1:00 o'clock p.m.
.....:

TRANSCRIPT OF JURY SELECTION AND CHARGE CONFERENCE
BEFORE THE HONORABLE TIMOTHY B. DYK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff: FARNAN LLP
BY: BRIAN E. FARNAN, ESQ

1 BY: MICHAEL J. FARNAN, ESQ

2 -and-

3 BAKER & BOTTS

4 BY: SCOTT F. PARTRIDGE, ESQ

5 BY: MICHAEL A. HAWES, ESQ

6 BY: LARRY G. SPEARS, ESQ

7 BY: M. NATALIE ALFARO, ESQ

8 BY: THOMAS ROONEY, ESQ

9

10

11 For Defendant: MORRIS, NICHOLS, ARSHT & TUNNELL

12 BY: JACK B. BLUMENFELD, ESQ

13 -and-

14 O'MELVENY MYERS LLP

15 BY: DARIN W. SNYDER, ESQ

16 BY: LUANN L. SIMMONS, ESQ

17

18 Other Appearances: JAMES SHERWOOD, ESQ

19 JEN POLSE, ESQ

20 In-house Counsel for Google

21

22

23

24 Court Reporter: LEONARD A. DIBBS

25 Official Court Reporter

P R O C E E D I N G S

(The proceedings occurred at 1:00 o'clock p.m. as follows:)

THE COURT: Be seated, please.

Good afternoon. Ladies and gentlemen of the jury panel, welcome to the United States District Court for the District of Delaware.

I extend a warm welcome to all of you.

My name is Timothy Dyk. I'll be the judge in this case. I don't normally hear cases in Delaware. I sit on the Court of Appeals in Washington. But chief Judge Stark and Judge Andrews asked me to come here and help out, and I was glad to do that.

My Law Clerk, David Yin, will be assisting me, as well as the court staff here.

Mr. Dibbs is the Court Reporter.

Nicole Selmyer is the Courtroom Deputy, and Deborah Bonselaar is going to also assist.

Before we begin, I'd like to tell you how much we appreciate your jury service and how important jury service is.

Service on an American jury is really one of the highest privileges and responsibilities of citizenship in this country.

It's so important that even Federal Judges like me are

1 often called for jury service. I was called about a month ago
2 myself, and I didn't make it on to the jury. And some of you
3 won't make it on to the jury today either and I will sympathize
4 with you when that happens.

5 Jury service is something that is inconvenient to many
6 of you, but it's very important to make our system of justice
7 work.

8 So your role is not only important, it is central and
9 critical to the operation of the justice system. And I thank
10 you and look forward to your participation in it.

11 Now, we're picking a jury here today for a trial that's
12 starting next Monday, May 23rd and I'll be the presiding judge.

13 And this is a patent case arising under the patent laws
14 of the United States. The trial is going to last all of next
15 week; that is, Monday through Friday. And the schedule is going
16 to go approximately 9:00 to 5:00 each day.

17 We hope to finish the trial next week, but that's not
18 guaranteed. If necessary, we may have to ask you to return on
19 Tuesday after Memorial Day.

20 During each day, we'll have a lunch break of about an
21 hour and lunch will be provided for the jurors, so you won't
22 need to leave the building.

23 And in addition to that, there will be two fifteen
24 minute breaks. One in the morning and one in the afternoon.

25 This is a civil case. We will select eight jurors.

1 And, of course, we have many more than eight of you here, but
2 that's the process of jury selection. It happens in every case.

3 The process will be done in part by my asking you
4 questions. And once we've selected a jury, those who are not
5 selected to be part of the eight-person jury will be excused.

6 On Monday, when you come back, those of you who are
7 selected we'll begin with preliminary jury instructions and the
8 lawyers opening statements.

9 Then the plaintiff who brought this case, will present
10 evidence. And after that the party being sued, the defendant,
11 will present its case. The plaintiff will then have an
12 opportunity to present rebuttal as will the defendant.

13 Finally, at the end of the trial, I will give the jury
14 instructions on the law and the lawyers will make their closing
15 arguments. Then the jurors will retire to deliberate. And once
16 the jury has reached a verdict, it will be read to the parties
17 and the case will be complete.

18 Now, I know you've all already answered a
19 questionnaire. And I'm going to, in addition to that, ask you a
20 series of questions to help the Court and the attorneys in the
21 jury selection process.

22 But before I ask any questions, I'm going to ask Ms.
23 Selmyer to swear the jury panel to answer the questions
24 truthfully.

25 (The jury panel was sworn.)

1 THE COURT: I'm going to add one other point.

2 Whether you're selected or not for the jury, it doesn't
3 reflect one way or the other on you. It's just part of the
4 process. It doesn't mean that anybody thinks you can't be fair,
5 or they don't like you, or whatever. It's just part of the
6 process by which jurors get selected every day in every
7 courtroom in the country.

8 I'm going to ask a series of questions. And if the
9 answer is yes, please stand up and state your jury number --
10 juror number when I point to you.

11 And then at the end of the questioning, the Deputy
12 Clerk will randomly ask 14 of you to take a seat in the jury box
13 over there. And the lawyers and I will then call some of you up
14 to sidebar here and may ask additional questions.

15 The first question is, do any of you have a problem
16 with the schedule that he told you about for this trial?

17 So let's start over in the first row on the left.

18 Would you state your juror number, please?

19 JURY NO. 12: 12.

20 THE COURT: You should stand.

21 JUROR NO. 25: I'm sorry. 25.

22 THE COURT: Let's continue across that row.

23 JUROR NO. 39:

24 JUROR NO. 33: 33.

25 JUROR NO. 17.

1 THE COURT: Okay. The next row then?

2 JUROR NO. 12: 12.

3 JUROR NO. 14: 14.

4 THE COURT: The row behind?

5 JUROR NO. 10: 10.

6 JUROR NO. 34: 34.

7 JUROR NO. 8. 33.

8 JUROR NO. 19: 19.

9 JUROR NO. 8: 8.

10 JUROR NO. 21: 21.

11 THE COURT: How about on the other side?

12 JUROR NO. 30: 30.

13 JUROR NO. 32: 32.

14 JUROR NO. 27: 27.

15 THE COURT: Okay. Is there anybody who answered yes to
16 that question that we haven't identified?

17 (No response.)

18 All right.

19 The second question is -- relates to kind of cases this
20 is. As I mentioned, it's a patent lawsuit involving the use of
21 computers, including tablets and Smartphones to access
22 geographical information from various points of view selected by
23 the engineer, and then displaying the images from those points
24 of view.

25 The plaintiff is ART+COM Innovationpool. And we'll

1 refer to the plaintiff from here on as ACI.

2 And ACI has sued the defendant Google. And we'll refer
3 to the defendant as Google from here on.

4 ACI claims that certain Google products, including
5 Google Earth, infringes patents. Google denies infringement
6 when it says the patent is invalid.

7 The jury in this case will be asked to decide whether
8 Google's products infringes ACI's patent, and whether the patent
9 is valid.

10 For those of you end up being on the jury, I'll give a
11 more detailed instruction on the law later in this case.

12 So the next question, No. 2 is, have you heard or read
13 anything about this case? Any of you heard or read anything
14 about this case?

15 (No response.)

16 THE COURT: No response.

17 Question No. 3, based on the description of this case,
18 is there anything that makes you think that you couldn't be a
19 fair and impartial juror in this case? Anyone?

20 (No response.)

21 THE COURT: No response.

22 The fourth question. Now, you have been given a list
23 of companies and organizations that is labeled Attachment A.

24 Do the jurors have that?

25 I'll give you a minute to look at Attachment A. It's a

1 list of companies and organizations. Then I'm going to ask you
2 a question about that.

3 The question is, have you or a member of your immediate
4 family ever worked for any of these companies or organizations?

5 (No response.)

6 THE COURT: No response.

7 And the next question, No. 5 is, do you or a member of
8 your immediate family now own or have you or any such family
9 member ever owned any stocks or bonds in any of these companies
10 or organizations? Anyone owning stocks or bonds?

11 Yes.

12 JUROR NO. 35: No. 35.

13 THE COURT: Anyone else?

14 Okay. No. 6, have you or a member of your immediate
15 family had any business dealings with, or relied financially in
16 any way any of these companies or organizations?

17 (No response.)

18 THE COURT: No response.

19 No. 7, have you or a member of your immediate family
20 had any experience, good or bad, with the products of any these
21 companies, including Google Earth or Google Maps, that might
22 keep you from being a fair and impartial juror in the case?
23 Anybody have such an experience?

24 (No response.)

25 THE COURT: No response.

1 8, do you possess any opinions about any of these
2 companies that might keep you from being a fair and impartial in
3 this case? Anyone?

4 (No response.)

5 THE COURT: No response.

6 Now, I'm going to ask one of the lawyers from each side
7 just to introduce himself and the other lawyers who are here.

8 And then we're also going to ask questions about THE
9 more detailed list of attorneys and law firms that you have in
10 your Attachment B.

11 Mr. Partridge?

12 MR. PARTRIDGE: Yes, your Honor. Thank you.

13 My name is Scott Partridge. I'm an attorney with Baker
14 Botts. I have here with me a number of attorneys from my firm.

15 I would like to start with Delaware lawyer, Brian
16 Farnan, who is local counsel in this case. And Michael Farnan,
17 also from the same firm. Brothers.

18 I'll begin with my partner, Michael Hawes, Gene Spears,
19 Natalie Alfaro-Gonzalez, Tom Rooney. And we're from Baker Botts
20 in the Houston office.

21 And I would like to introduce my client, who's from
22 Berlin, Germany. His name Detlef Andreovits, from Berlin.

23 And that's the group in the courtroom at the present
24 time. We'll have more people for you to meet as the case
25 progresses.

1 THE COURT: Thank you.

2 Mr. Snyder?

3 MR. SNYDER: Good afternoon.

4 My name a Darin Synder. I'm with the law firm of
5 O'Melveny and Myers.

6 With me here is today my partner, Luann Simmons. Also
7 Jack Blumenfeld from the local law firm of Morris Nichols here
8 in Delaware. We also brought with us our Case Manager, Shivon
9 Meblin.

10 I would also like to introduce you to two people from
11 our client Google, Jen Polse and Jim Sherwood.

12 Thank you very much.

13 THE COURT: Okay. Thank you both.

14 Now you have the more detailed list, which is
15 Attachment B, and the first question is -- I believe this is
16 Question No. 9 -- are you related to, or personally acquainted
17 with, any of those attorneys, or have you ever been represented
18 by any of those attorneys or other associates or members of the
19 list listed law firms?

20 Anybody? Anybody have any relationship with these
21 lawyers or law firms?

22 (No response.)

23 THE COURT: No? Okay.

24 No. 10 -- oh, I'm sorry -- yes?

25 JUROR NO. 21: Currently or ever?

1 THE COURT: Why don't we say either currently or ever.

2 JUROR NO. 21: No. 21.

3 JUROR NO. 16: 16.

4 THE COURT: Anyone else?

5 (No response.)

6 Okay. No. 10 is, do any of your immediate families,
7 such as spouse, child, parent, or sibling know any of the
8 attorneys or the law firms that I've just mentioned? In other
9 words, does anyone in your immediate family know any of the
10 attorneys and law firms?

11 (No response.)

12 THE COURT: No?

13 11 is, have any of you or your immediate family members
14 had any business dealings with, or been employed by any of these
15 attorneys or law firms, employment?

16 Yes?

17 JUROR NO. 21: 21.

18 THE COURT: Anyone else?

19 (No response.)

20 Okay. Question No. 12, do you have any negative views
21 or opinions of the named attorneys or law firms that have just
22 been mentioned? Any negative views?

23 (No response.)

24 THE COURT: No?

25 All right.

1 Question No. 13, and this is going to require you to
2 look at Attachment C. You've been given a list of the
3 individuals who might appear as witnesses in this case. That's
4 Attachment C. Take a moment to look at that.

5 (Pause)

6 And the question is, are you related to, or personally
7 acquainted with any of the individuals on that list of
8 respective witnesses? Anyone related to or acquainted with any
9 of those witnesses?

10 (No response.)

11 THE COURT: No?

12 All right.

13 And the next item is Question 14. It relates to
14 Attachment D. That is a list of subject matter areas.

15 And the question is, have you ever been educated,
16 employed, trained, or had any significant experience in the
17 subject matter areas listed in Attachment D?

18 JUROR NO. 35: 35.

19 JUROR NO. 16: 16.

20 JUROR NO. 46: 46.

21 JUROR NO. 13: 13.

22 JUROR NO. 14: 14.

23 THE COURT: Anyone else?

24 (No response.)

25 THE COURT: Okay.

1 Question No. 15, do you have any significant experience
2 with the operation and use of Google Earth and/or Google Earth
3 for Maps products.

4 And that's -- we're not asking about casual use here.
5 We're asking about significant experience with Google Earth
6 and/or Google Earth for Maps?

7 JUROR NO. 12: 12.

8 THE COURT: Anyone else?

9 JUROR NO. 23: 23.

10 THE COURT: Okay. Anyone else?

11 (No response.)

12 THE COURT: Okay. Question No. 16, have you or any
13 member of your immediate family ever been employed by the United
14 States Patent and Trademark Office? Employed by the Patent and
15 Trademark Office? Anyone?

16 (No response.)

17 THE COURT: Okay. Question 17, have you or any member
18 of your immediate family ever applied for or obtained a United
19 States or a foreign patent? Anybody ever obtain a patent?

20 JUROR NO. 42: 42.

21 JUROR NO. 37: 37.

22 THE COURT: Anyone else?

23 (No response.)

24 THE COURT: Okay. Question 18, have you, your current
25 or former employers, or any member of your immediate family

1 everybody involved in the dispute about patent rights? Involved
2 in a dispute about patent rights?

3 Anyone?

4 JUROR NO. 42: You said "employers"?

5 THE COURT: Yes. With your employers. Your current or
6 former employers?

7 JUROR NO. 42: My current employers.

8 THE COURT: Anyone else?

9 (No response.)

10 THE COURT: All right.

11 All right.

12 Question 19, have you or any member of your immediate
13 family ever been involved in the licensing of patents or other
14 intellectual property rights? Patent licensing.

15 (No response.)

16 THE COURT: Anyone?

17 Okay. Question 20, do you have any opinions about
18 patents, patent rights, or the United States Patent and
19 Trademark Office that might make it difficult for you to be a
20 fair and impartial juror in this case? Anyone?

21 (No response.)

22 THE COURT: Okay. Question 21, do you believe it would
23 be wrong for someone to profit from or be awarded damages for
24 his or her invention or discovery? Anyone?

25 (No response.)

1 THE COURT: All right.

2 22, does anyone have any positive or negative feelings
3 about large corporations? Anyone?

4 (No response.)

5 THE COURT: No.

6 23, have you ever served on a jury in a civil case
7 within the last 15 years? Served on a jury in civil case in the
8 last 15 years?

9 JUROR NO. 41: 41.

10 THE COURT: Anyone else?

11 JUROR NO. 23: 23.

12 THE COURT: Anyone else?

13 (No response.)

14 THE COURT: Okay. Question 24, have you, a member of
15 your family, or your employer, past or present, been involved in
16 a civil case that was a party or a witness within the last 15
17 years? Anyone?

18 (No response.)

19 THE COURT: Question 25, if you're selected to sit as a
20 juror in this case, are you aware of any reason why you would be
21 unable to render a verdict based solely on the evidence
22 presented at trial? Anyone?

23 (No response.)

24 THE COURT: All right.

25 26, if you are selected to sit as a juror in this case

1 are you aware of any reason why you would not be able to follow
2 the law as I instruct you? Anyone?

3 (No response.)

4 THE COURT: 27, is there anything such as poor vision,
5 difficulty hearing, difficulty understanding spoken or written
6 English that would make it difficult for you to serve on this
7 jury?

8 JUROR NO. 4: 4.

9 JUROR NO. 2: 2.

10 THE COURT: Anyone else?

11 JUROR NO. 17: 17.

12 THE COURT: Anyone else?

13 (No response.)

14 THE COURT: All right.

15 No. 28, and this is the last question, is there
16 anything else, including something that you remembered in
17 connection with one of the earlier questions, any questions that
18 you might have missed that you would like to tell me about in
19 connection with your service as a juror in this case? Does
20 anybody have anything else that he or she wants to raise?

21 (No response.)

22 THE COURT: Okay. All right.

23 Let's seat our 14 jurors in the jury box.

24 When your number is called, come up and go into the
25 jury box.

1 THE CLERK: Juror No. 29, will you please come forward
2 and take the first seat in the first row in the jury box?

3 Juror No. 25, will you please come forward and take the
4 second seat in the first row of the jury box?

5 Juror No. 18, will you please come forward and take the
6 third seat in the first row of the jury box?

7 Juror No. 7, will you please come forward and take the
8 fourth seat in the first row of the jury box?

9 Juror No. 15, will you please come forward and take the
10 fifth seat in the first row of the jury box?

11 Juror No. 43, will you please come forward and take the
12 sixth seat in the first row of the jury box?

13 Juror No. 5, will you please come forward and take the
14 seventh seat in the first row of the jury box?

15 Juror No. 42, will you please come forward and take the
16 first seat in the second row of the jury box?

17 Juror No. 38, will you please come forward and take the
18 second seat in the second row of the jury box?

19 Juror No. 34, will you please come forward and take the
20 third seat in the second row of the jury box?

21 Juror No. 39, will you please come forward and take the
22 fourth seat in the second row of the jury box?

23 Juror No. 36, will you please come forward and take the
24 fifth seat in the second row of the jury box?

25 Juror No. 3, will you please come forward and take the

1 sixth seat in the second row of the jury box?

2 And Juror No. 33, will you please come forward and take
3 the seventh seat in the second row of the jury box?

4 THE COURT: Mr. Partridge and Mr. Snyder, could you
5 come up?

6 MR. PARTRIDGE: May I bring up Mr. Farnan?

7 THE COURT: Sure.

8 (A sidebar discussion was held as follows:)

9 THE COURT: With respect to Juror No. 29 is no to any
10 questions.

11 With respect to Juror 25, she's in Seat 2?

12 MR. SNYDER: That's correct.

13 THE COURT: Juror No. 18 is in Seat 3. No.

14 Juror No. 7 is in Seat 4. Again no.

15 Juror No. 15 is in Seat 5. Again no.

16 In Seat 6 is Juror No. 43. Again no.

17 And juror No. 5 in Seat 7 and affirmatively answered
18 Question 1.

19 And then in the second row in the first seat I have
20 Juror No. 42. I have an affirmative response to Questions 10
21 and 11.

22 And Juror No. 38 in Seat 9 also no.

23 And in Seat 10, Juror No. 34, yes to Question 1.

24 In Seat 11, Juror No. 39, yes to Question 1.

25 And in Seat 12, Juror 36, yes to Question 7.

1 And with respect to Seat 13, I have Juror No. 3.

2 Seat 14 I have a response to Question 1.

3 Then in Seat 14, Juror No. 33, I have a no answer.

4 MR. SNYDER: I'm sorry, which juror number?

5 THE COURT: 33.

6 MS. FARNAN: So it's Juror 25 who answered an

7 affirmative answer to Question 14?

8 MR. SNYDER: I did not catch that.

9 MS. FARNAN: We may have misheard.

10 THE COURT: 25.

11 MR. SNYDER: I thought it was to Question 14?

12 MR. PARTRIDGE: It was with regard to one of the

13 attachments.

14 THE COURT: Now, are there any of the jurors who

15 answered that either of you would like to question about

16 anything in the questionnaire that they filled out?

17 MR. PARTRIDGE: Any of them that answered no to any of

18 the questions, whether or not we want to ask them follow-up

19 questions?

20 THE COURT: Based on the questionnaire?

21 MR. PARTRIDGE: No.

22 THE COURT: Why don't we begin.

23 Who's doing the questioning?

24 MR. PARTRIDGE: For us? Mr. Farnan.

25 THE COURT: Who?

1 MR. PARTRIDGE: Mr. Farnan, Brian Farnan.

2 MR. SNYDER: I will, your Honor.

3 THE COURT: Any other questions?

4 MR. PARTRIDGE: No, your Honor.

5 MR. SNYDER: No, your Honor.

6 MR. PARTRIDGE: I assume you're going to have them come
7 up to sidebar and question them with respect to the question
8 they answered affirmatively?

9 THE COURT: Yes.

10 (End of sidebar discussion.)

11 THE CLERK: Juror No. 5, could you please come to
12 sidebar?

13 (A sidebar discussion was held as follows:)

14 THE COURT: Would you state your name for the record?

15 JUROR NO. 5: Lee A. Schuldt.

16 THE COURT: And my recollection is that you answered
17 yes to the question, whether you or any member of your family.

18 MR. SNYDER: It was Question No. 1, your Honor.

19 THE COURT: That you had a problem with the schedule?

20 JUROR NO. 5: Yes. I have severe lower back pain. I
21 take shots to determine what was wrong. I had one shot on my
22 right side to relieve the pain, but I still have to have it on
23 the left side, which is due to be done next Thursday.

24 THE COURT: The problem is getting the shot or serving
25 with the back pain?

1 JUROR NO. 5: Well, I'm scheduled to get a shot next
2 Thursday. I would like to get the shot if I could.

3 THE COURT: Is it possible to get that before Court or
4 after Court?

5 JUROR NO. 5: It's scheduled for 11:00 a.m. So I don't
6 know if that's a problem for you guys or not.

7 THE COURT: Well, we can't -- would it be possible for
8 you to get the shot -- is the doctor you would be seeing nearby?

9 JUROR NO. 5: He's at Christiana Hospital.

10 THE COURT: How far away is that?

11 JUROR NO. 5: I don't know. It must be like 10, 12
12 miles.

13 THE COURT: Any questions?

14 MR. SNYDER: Mr. Schuldt, is it difficult for you to
15 sit because of your back?

16 JUROR NO. 5: Not right now, no. It's like a light
17 switch, it comes and goes. I don't know when it's going to get
18 hard. And once I get it, I don't know when it's going to go
19 away.

20 MR. FARNAN: How long ago has this shot been scheduled
21 for?

22 JUROR NO. 5: I believe it's three weeks now. I have a
23 conflict with scheduling it and with the doctor's office and my
24 work.

25 THE COURT: Any further questions?

1 MR. SNYDER: Nothing further, your Honor.

2 THE COURT: Thank you.

3 JUROR NO. 5: Thank you.

4 THE COURT: Any objection?

5 MR. SNYDER: No objection.

6 THE COURT: Any objection to him being excused?

7 MR. PARTRIDGE: No.

8 MR. SNYDER: No.

9 THE CLERK: Now, normally, what I would do is call a
10 random number in the box to fill his seat.

11 (End of sidebar discussion.)

12 THE CLERK: Juror No. 22, can you please come forward
13 and take the seventh seat in the first row of the jury box.

14 We have Juror No. 22 as a no.

15 MR. SNYDER: I do not believe she answered yes to any
16 of the questions.

17 THE COURT: Juror No. 42.

18 Juror No. 42, would you come up to sidebar?

19 (A sidebar discussion was held as follows:)

20 THE COURT: Would you state your name for the record,
21 sir?

22 JUROR NO. 42: Patrick Foley, F-O-L-E-Y.

23 THE COURT: You answered affirmatively to two questions
24 whether you or a member of your immediate family applied for or
25 obtained a U.S. or foreign patent.

1 JUROR NO. 42: Yes.

2 THE COURT: Would you describe for us that
3 circumstance?

4 JUROR NO. 42: Yes. My father was a Ph.D. chemist for
5 DuPont, so he filed patents for DuPont with his name on it.

6 THE COURT: Just one patent?

7 JUROR NO. 42: I'm not sure. At least one.

8 THE COURT: At least one?

9 JUROR NO. 42: It was a long time ago.

10 THE COURT: Okay. Then you also responded
11 affirmatively to the question, have you ever, or your former or
12 currently employer, or member of your immediate family ever
13 been involved in patent rights?

14 JUROR NO. 42: Yes. I work for DuPont as well now.

15 THE COURT: And what are the circumstances of your
16 involvement?

17 JUROR NO. 42: I have not been involved myself. The
18 company has been probably involved in them all the time.

19 THE COURT: Was your father ever involved?

20 JUROR NO. 42: Oh, I'm sure, yes. He was a long-term
21 DuPont employee.

22 THE COURT: Questions?

23 MR. FARNAN: Could you be fair and impartial to a
24 patent owner that brings a lawsuit against a company for
25 infringement?

1 JUROR NO. 42: Yes, I think so. Based on the facts,
2 yes.

3 MR. FARNAN: Could you sit and listen to the facts and
4 make a decision based on the evidence given before you?

5 JUROR NO. 42: Absolutely, yes.

6 MR. FARNAN: And going into the process, you don't sway
7 one way or another?

8 JUROR NO. 42: No.

9 MR. SNYDER: Mr. Foley, do you know which side of
10 DuPont's patent disputes that DuPont is normally on?

11 JUROR NO. 42: I think they are on both. I don't know
12 which way is the norm. I'm not in that area.

13 MR. SNYDER: Okay.

14 THE COURT: Any other questions?

15 MR. FARNAN: Do you currently have any involvement with
16 patents at DuPont?

17 JUROR NO. 42: Do I?

18 No, I do not have any patents.

19 MR. FARNAN: Are you working on any patent ideas or
20 anything?

21 JUROR NO. 42: No, I have not been in research and
22 development.

23 MR. FARNAN: Thank you.

24 THE COURT: Thank you. You can sit down.

25 Any objections to that juror?

1 MR. SNYDER: No, your Honor.

2 MR. FARNAN: No, your Honor.

3 THE COURT: You can take a seat back in the jury box.

4 Juror No. 34.

5 (End of sidebar discussion.)

6 THE CLERK: Juror No. 34, can you please come to

7 sidebar?

8 (A sidebar discussion was held as follows:)

9 THE COURT: State your name for the record, please?

10 JUROR NO. 34: Jason Decena.

11 THE COURT: You answered affirmatively to Question 1,

12 which was the schedule presents a problem for you?

13 JUROR NO. 34: Yes.

14 THE COURT: What's the problem?

15 JUROR NO. 34: It's for -- I have a business meeting

16 next week on Wednesday. I didn't realize I was going to go all

17 the way for multiple days. Honestly, I anticipated that

18 question. This was scheduled. It's an international meeting.

19 THE COURT: What do you mean international meeting?

20 JUROR NO. 34: Well, it is a flight out to the

21 Philippines.

22 THE COURT: For you to fly out?

23 JUROR NO. 34: Yes, for the employer.

24 THE COURT: Is there any reason that couldn't be

25 rescheduled for another time?

1 JUROR NO. 34: It could be rescheduled, yes.

2 THE COURT: Any questions?

3 MR. SNYDER: If you rescheduled your meeting, would it
4 affect your ability to pay attention to the proceedings in the
5 case and serve as a juror?

6 JUROR NO. 34: It may. It's something that I'm very
7 deeply involved in for my company. And right now at this
8 sensitive point in time for my business, yes. It may possibly
9 for the fact that the duration of it, five days, there is a lot
10 of time sensitive issues that need to be addressed with bank
11 institutions, lawyers, and such will be coming up soon.

12 THE COURT: Why would that affect your ability to
13 participate in this case?

14 JUROR NO. 34: Just the nature of how I operate is,
15 writing business plans and everything. It's not a strong point.
16 And it's something that I'm deeply involved in at the time at
17 the moment. I'm trying to juggle that and also I'm hiring as
18 well.

19 THE COURT: If you were to sit on the jury, would your
20 concerns about your business, would it affect your ability to
21 give a fair and impartial verdict?

22 JUROR NO. 34: No, I don't think so.

23 THE COURT: Any other questions?

24 MR. FARNAN: No.

25 MR. SNYDER: No.

1 THE COURT: Thank you.

2 THE COURT: Any objection to seating him?

3 MR. FARNAN: No.

4 MR. PARTRIDGE: I think he should be seated, your
5 Honor.

6 MR. SNYDER: No objection.

7 THE COURT: 39.

8 (End of sidebar discussion.)

9 THE CLERK: Juror No. 39, can you please come to
10 sidebar?

11 (A sidebar discussion was held as follows:)

12 THE COURT: Could you state your name for the record?

13 JUROR NO. 39: Katherine Hauch.

14 THE COURT: You answered affirmatively to Question 1,
15 as to whether the schedule presented a problem for you.

16 JUROR NO. 39: Yes.

17 THE COURT: What is the problem?

18 JUROR NO. 39: I work in a child care center and we
19 have under 20 employees. I'm responsible for closing up the
20 building in the evening. I live over two hours away.

21 THE COURT: Can somebody else do that for you during
22 the trial?

23 JUROR NO. 39: Well, they probably could be trained on
24 it, on how to lock up the building and such.

25 THE COURT: Is that something that can be done between

1 now and the start of the trial on Monday?

2 JUROR NO. 39: I believe so, yes.

3 THE COURT: Any questions?

4 MR. SNYDER: Ms. Hauck, you said you live more than two
5 hours away. It takes two hours to get here and two hours to get
6 home?

7 JUROR NO. 39: Yes.

8 THE COURT: Any other questions?

9 (No response.)

10 THE COURT: Thank you.

11 Any objection to seating this person?

12 MR. FARNAN: No, your Honor.

13 MR. SNYDER: No.

14 THE COURT: Thank you. You may take your seat back in
15 the box.

16 Juror No. 36.

17 (End of sidebar discussion.)

18 THE CLERK: Juror No. 36, would you please come to
19 sidebar?

20 (A sidebar discussion was held as follows:)

21 THE COURT: State your name for the record, please?

22 JUROR NO. 36: Ryan Mullins.

23 THE COURT: You answered affirmatively, I think, to
24 Question 17. And that was in the list of subject matter areas.
25 Why did you answer yes?

1 JUROR NO. 36: First, I'm going to school for computer
2 science. And I'm also Adobe Photoshop certified. And I Coded
3 Sequence Plus --

4 THE COURT: Anything else?

5 JUROR NO. 36: No.

6 THE COURT: Questions?

7 MR. FARNAN: Not from us, your Honor.

8 MR. SNYDER: Mr. Mullins, would you be able to base
9 your verdict in this case on the evidence that was presented and
10 not on your knowledge that you might know from other sources?

11 JUROR NO. 36: Could you give me an example?

12 THE COURT: I think what he's asking is, whether you
13 could be a fair and impartial juror based on the evidence that
14 you heard in the courtroom as opposed to your knowledge that you
15 have outside the courtroom?

16 JUROR NO. 36: Yes, I could.

17 MR. PARTRIDGE: How far into your classes are you?

18 JUROR NO. 36: I have one more semester left.

19 MR. PARTRIDGE: So you would graduate this summer?

20 JUROR NO. 36: Yes.

21 THE COURT: Any other questions?

22 MR. SNYDER: No more questions.

23 THE COURT: Thank you.

24 Any objection to this juror?

25 MR. SNYDER: No objection.

1 MR. PARTRIDGE: No objection.

2 THE COURT: Thank you. You may take your seat back in
3 the box.

4 THE COURT: Juror No. 20.

5 (End of sidebar discussion.)

6 THE CLERK: Juror No. 20, would you please come to
7 sidebar?

8 (A sidebar discussion was held as follows:)

9 THE COURT: Would state your name for the record,
10 please?

11 JUROR NO. 20: Nicholas Nardo.

12 THE COURT: You answered affirmatively to question No.
13 1. You said that the schedule would present a problem?

14 JUROR NO. 20: The schedule for me -- I work at my
15 family paid company. I'm pretty much the project manager for
16 about 20 jobs. It's kind of rough for me to be here. But I
17 guess it's up to you guys.

18 THE COURT: Well, is there somebody that can fill in
19 for you during the week?

20 JUROR NO. 20: Not so much. It's -- my father's the
21 owner and he's actually going to be somewhat out of town for a
22 vacation that week. It's going to be a little rough.

23 But, I mean, I guess I can make it work.

24 THE COURT: Okay. It's up to you guys.

25 MR. FARNAN: No questions, your Honor.

1 MR. SNYDER: No questions.

2 THE COURT: Thank you.

3 Any objections?

4 MR. FARNAN: Just on the hardship. Your Honor, for a
5 business owner, he's going to be distracted if he's the only one
6 left.

7 We don't have a strong view on it, but it seems like it
8 could be a true hardship for him.

9 THE COURT: He said he could make it work.

10 MR. SNYDER: I have no objection.

11 THE COURT: Thank you. You can take your seat back in
12 the box.

13 That's everybody.

14 MR. PARTRIDGE: That is it?

15 THE COURT: Yes.

16 Do you want to take a couple minutes?

17 MR. SNYDER: Yes. Thank you, your Honor.

18 MR. PARTRIDGE: Thank you, your Honor.

19 (End of sidebar discussion.)

20 THE COURT: Let me explain to the jury what is going
21 on.

22 We now have a group of 14 seated in the jury box. And
23 that number will be reduced to eight. And that will happen
24 because each side gets to remove three jurors from the panel.

25 And, so, that process will begin and then we'll

1 announce who the six are who will be removed and the eight
2 remaining.

3 It does not reflect adversity in any way if you are
4 removed from the jury. It's just part of the process.

5 THE CLERK: Okay. When I call your number, it means
6 you're free to leave of jury box.

7 THE CLERK: Juror No. 25, you're free to leave.

8 THE CLERK: Juror No. 18, you're free to go as well.

9 THE CLERK: Juror 22, you're free to leave.

10 THE CLERK: Juror No. 42, you're free to leave the jury
11 box.

12 THE CLERK: Juror No. 39, you're free to leave.

13 THE CLERK: And juror 33, you are also free to go.

14 THE COURT: Okay. Now, we've selected our jurors. The
15 rest of the potential jurors are free to go. And as always we
16 have more people than we needed to.

17 We appreciate your participation in the process to help
18 us get a fair jury. I thank you very much for your service and
19 coming here today. And you're all excused, except for those in
20 the jury box.

21 Thank you very much.

22 (The jury panel exited the courtroom.)

23 THE CLERK: Okay. Now we're going to reseal everyone
24 to get you in a more of a collective unit.

25 So Juror No. 29, you can stay where you are.

1 Juror No. 7, you're going to move down to seat No. 2.

2 Juror No. 15, you'll be in Seat No. 3 now.

3 Juror No. 43, you're going to be in Seat No. 4.

4 And Juror No. 38, if you could just shift down one.

5 34, you'll be next to 38.

6 36, you'll be in No. 3.

7 And juror No. 3, you'll be in the fourth seat.

8 THE COURT: Now, the eight of you have now be sworn as
9 the jury in the case.

10 And at the end of the trial, it's going to be your job
11 to decide the facts based on the evidence you saw and heard.

12 I'll give you instructions on the law and procedures
13 that you should follow in making your decision.

14 But I do not decide the facts. That's for you to do at
15 the trial, which is expected to start next Monday and last about
16 five days.

17 You will begin deliberations on Friday afternoon. If
18 you can't reach a verdict on Friday, we'll come back the next
19 week after Memorial Day.

20 And now I'm going to ask the Deputy Clerk to swear you
21 in as jurors.

22 (The jury was sworn.)

23 THE COURT: Be seated, please.

24 Now, next week when we resume on Monday, I'll give you
25 more detailed instructions, but for now I want to talk to you

1 about the importance of maintaining confidentiality and
2 impartiality.

3 Until this trial is over, do not discuss this case with
4 anyone. That includes your family. And do not allow anyone
5 else to discuss the case with you until -- and that includes
6 fellow jurors -- until you recess to deliberate.

7 And, in particular, you should hold yourselves apart
8 from the people in this case and not speak to the parties, the
9 witnesses, attorneys, or anyone associated with them.

10 If they approach you in the elevator to say "Good
11 morning," that's fine. But apart from that, you cannot have any
12 conversation with them.

13 If anyone should try to discuss the case with you, or
14 otherwise approach you about the case, you should inform me
15 immediately about that, because that's a very serious matter.

16 Now, as I mentioned, you shouldn't even discuss the
17 case with your fellow jurors unless and until you recess and
18 deliberate.

19 Now, you're going to be passing the lawyers in the
20 hall. They may not speak to you except to say "Hello." They're
21 are not being rude. They are simply following instructions.

22 And the lawyers are not allowed to speak to you after
23 the case is over either, unless I give them special permission,
24 which I would only do in exceptional circumstances.

25 If any of you use social networks, which is likely,

1 such as Facebook or Twitter, do not discuss, mention, post,
2 update of any kind on these media regarding the trial of this
3 case while it's going on. You can tell people about your
4 experience with the case when it's over with. While it's going
5 on, no text messages, no e-mails about the case, no discussion
6 over the telephone, no discussion in person.

7 Now, I'll allow you to have your cellphones here in the
8 Courthouse. You should not bring them into the courtroom, but
9 you should leave them in the jury room.

10 You can use these cellphones during lunch or during the
11 breaks to call your family or your friends, say that you're
12 going to be a few minutes late or whatever.

13 But, again, you can't use them to discuss the case.

14 You're not allowed, also, to do any research into any
15 of the facts or issues related to the case. You can't go on the
16 internet to learn more about the case. You can't go on the
17 internet to learn more about the parties, the lawyers, or patent
18 law. Don't watch, or listen, or read any news accounts of the
19 trial should you come across them.

20 The reason for all of this is that you got to be guided
21 solely by what you see and hear in this courtroom during the
22 trial. And it is an important part of our civil justice system,
23 if two parties disagree, they can bring their dispute to court
24 and obtain a verdict from a fair and impartial jury.

25 Finally, I want to emphasize that violating these

1 instructions would be a very serious matter. As you can see,
2 there's been a great deal of time, effort, and money in getting
3 this case ready for trial, and making sure that it's going to be
4 tried fairly and impartially.

5 If you were to violate the instructions that I gave
6 you, it could place all of that in jeopardy, and we might have
7 to go back and do it all over again.

8 You must follow instructions to the letter.

9 Now, as I mentioned, the trial will begin on Monday,
10 May 23rd at 9:00 a.m. We'd like you to arrive at 8:45 a.m. to
11 give your lunch orders and some other things. But you must
12 arrive promptly, so that we can begin the trial promptly.

13 And you're now excused. We thank you for your service
14 and we'll see you next week.

15 (The jury exited the courtroom.)

16 THE COURT: You can be seated, please.

17 Now, I think counsel mentioned that you wanted to
18 discuss some of the issues related to the draft of final jury
19 instructions and verdict form, which we can spend some time
20 doing this afternoon.

21 Is there anything else, besides that, that you have?

22 And I guess there is the remaining claim construction
23 issue and I would like to spend a little time addressing that as
24 well.

25 Anything else?

1 MR. PARTRIDGE: I think that's the agenda, your Honor.
2 That works for us.

3 MR. SNYDER: Two matters relating to the administration
4 of the trial, your Honor.

5 First, we had talked during the Pretrial Conference
6 about the presentation of confidential exhibits. As you can
7 see, the screen that is used generally for presenting to the
8 jury is visible to, at least a portion of the gallery.

9 What counsel had talked about and agreed on was having
10 a third party vendor who could bring in a screen. Actually, I
11 see that there is a screen -- but putting it in a place so that
12 confidential exhibits, when necessary, could be shown to the
13 jury, but not visible to the gallery.

14 THE COURT: That's fine, as long as it's agreed on.

15 MR. SNYDER: Okay.

16 MR. PARTRIDGE: We have, your Honor.

17 MR. SNYDER: Thank you, your Honor.

18 And then second, your Honor, relating to the
19 presentation of adverse witnesses, we understand -- well, there
20 are witnesses that we believe the plaintiff will call in its
21 case-in-chief for whom we will have questions that likely go
22 beyond the scope of direct.

23 And rather than serve them with trial subpoenas, so
24 they would have to return, ACI has agreed that if we give them
25 notice, that they will bring the witness back during Google's

1 case-in-chief, so that they can testify.

2 THE COURT: That's fine.

3 MR. PARTRIDGE: Your Honor, at this point, there is
4 only one witness that we're aware that falls into that category.

5 And I would ask, if there are going to be any others
6 that given their travel schedules, that we know about that
7 sooner rather than later.

8 But at the moment, there is one witness that has been
9 identified with whom I have agreed to this procedure.

10 MR. SNYDER: That's correct, your Honor.

11 As soon as we know, I believe on Saturday night who
12 they are calling live, we will be able to tell them who of those
13 witnesses we would like to remain, so that they can testify in
14 Google's case-in-chief.

15 THE COURT: Okay. That's fine.

16 What I'd like to do is spend a few minutes talking
17 about the claim construction issue and trying to resolve that.
18 Then we'll take a recess and come back. And we'll discuss the
19 final jury instructions and the verdict form.

20 I have read the submissions from the parties. And let
21 me tell you tentatively where I am and it will help you address
22 the issue.

23 It seems to me that it's clear that the specifications
24 describe the embodiments of the invention in which there is, in
25 fact, a display unit, and the display unit is part of the

1 invention.

2 And, in fact, I looked back at the original claims in
3 this case and some of the device claims do have a display unit
4 included as one of the limitations.

5 However, I don't read the method claims that are
6 involved here as involving an actual display. And they don't
7 use the word "display." They don't use the words "display
8 unit."

9 And while Judge Andrews originally said some of the
10 claim language suggested a display, he also said that -- he
11 contemplated that there were other process steps beyond that.

12 And my tentative view is that because there is no
13 explicit reference to a "display" or "display unit" in the
14 method claims, that those claims do not require that as part of
15 the step, as part of the claim.

16 In other words, they don't require that there actually
17 be a display of the information on the display unit. And, also,
18 that the operation of the standard software that is associated
19 with the display unit wouldn't be part of the method claim.

20 But that's my tentative view. I'm happy to hear from
21 you. In particular, I'm interested in, under my tentative view,
22 what would be a correct description of the software operation of
23 the individual display unit that would be outside of the method
24 claim?

25 MR. SPEARS: I believe that we would describe the

1 operation of the software that is outside of the method claim as
2 generic, third-party graphic software and firmware, as opposed
3 to application software like Google Earth.

4 THE COURT: Any further comments on the tentative claim
5 construction?

6 MR. SPEARS: I believe your Honor has addressed all of
7 these issues as they relate to ACI.

8 THE COURT: Mr. Snyder?

9 MR. SNYDER: Thank you, your Honor.

10 Let me make a couple of points.

11 First, we do disagree with the Court's tentative
12 ruling. You are -- and let me make two arguments.

13 First, it is true that the method claim does not
14 specifically refer to a display device, but it uses the term
15 "represent." And I do not believe that that term is described
16 or defined anywhere in the specification.

17 The only definition we've had of "represent" so far in
18 this case is the one that Judge Andrews provided where he
19 substituted literally the word "display" for the word
20 "represent" in that element of the claim.

21 Second, every embodiment in the patent, in the
22 specification, refers to a physical display. There aren't any
23 embodiments. There aren't any examples where there is
24 information that is provided, particularly in the context of
25 claiming that it is representing something before it is handled

1 by third-party graphic software, or firmware, or something else.

2 In every context in which "displaying" or
3 "representing" occurs in the patent and in the specification, it
4 refers to an actual display that is visible to a person.

5 So I wouldn't know how to define "represent," if it
6 means something other than something that is perceptible to the
7 user of the device.

8 It would be -- I guess -- and related to that point, I
9 said there were only two, maybe this is three, your Honor.

10 It would be impossible to really tell, for the user to
11 tell, if the method were being performed if the Court adopts a
12 construction where there is some electrical signal that is sent.
13 And that qualifies as representing and yet nothing is visible to
14 the user. The method requires that the user specify a field of
15 view.

16 And then, apparently, the method could go on. And it
17 could -- the patent claim could be fulfilled, but the user would
18 never know that, which really defeats the whole point of what
19 the patent and the claim is trying to accomplish, which is a
20 display to the user.

21 THE COURT: Well, that's the ultimate result of it.

22 But it seems to me that the references in Subsections E
23 and F to representing the data, we're talking about sending data
24 that is necessary to accomplish the display, rather than
25 referring to the actual display itself.

1 What is your view about the description of the software
2 that would be excluded under my tentative interpretation of the
3 claim?

4 In other words, accept for the moment that I am ruling
5 that this doesn't actually claim steps, don't actually require
6 the display to the user, doesn't require the use of a display
7 unit, and that the software associated with that display is not
8 part of the method.

9 How would you describe the scope of the software?

10 MR. SNYDER: I don't know how I would draw that line,
11 your Honor. I haven't heard a proposed definition until just
12 now from the plaintiffs.

13 And the suggestion of a third-party graphic software,
14 all that really says is it's other than the accused infringer,
15 other than the person practicing the patent.

16 I'm not -- that just -- that defines it by who owns it
17 and not by its operation, or by its function, or by its method.

18 THE COURT: Well, I don't think that's what I would do.

19 I think what I would describe it as generic software
20 that is typically sold with the display device or used with the
21 display device.

22 In other words, it's generic software rather than
23 anything in particular adapted to Google Earth.

24 MR. SNYDER: The difficulty there, your Honor, is that
25 generic to one person is probably not generic to another.

1 The accused software operates on a variety of different
2 platforms, different operating systems. It works with those
3 operating systems, works with different hardware. They're
4 supplied by a variety of different vendors.

5 So we're now engaged in a process of trying to draw a
6 line where there isn't any indication in the patent, or
7 certainly not in the specification, or the claims, of where that
8 line ought to be drawn.

9 THE COURT: Well, if I go with my ruling, I'm going to
10 have to draw a line somewhere. And I need to draw it in a way
11 that is comprehensible to the parties.

12 And the tentative ruling is that it wouldn't include
13 the display on the display unit. I'm struggling for an accurate
14 description of -- a meaningful description of what software
15 associated with that display unit would be excluded from the
16 steps of the method claim.

17 MR. SNYDER: And I apologize if I'm not being helpful
18 to the Court, your Honor.

19 It is a confounding problem, because when the claim
20 language uses the term "represent," if it doesn't mean that it's
21 showing something, displaying something to a user, we're now
22 talking about electrical signals organized in some way.

23 Does it depend on the format of those signals? I
24 really don't know how to draw that line.

25 THE COURT: Okay. Is there anything further that you

1 want to address before we recess?

2 MR. SNYDER: Nothing further, your Honor.

3 THE COURT: Anything from the plaintiff?

4 MR. SPEARS: I think in concept of genericness, it's a
5 perfectly decent way of describing the operations of this
6 software that go beyond the scope of the claims.

7 That software is generic in the sense that it works
8 with a variety of applications. It's the same software that
9 would be rendering information tendered to it from Google Earth,
10 as would be rendering information tendered to it from any other
11 graphics application.

12 So generic is a perfectly good way of describing that
13 software and firmware. This operation is outside the scope of
14 Claim 1.

15 THE COURT: Okay. Thank you.

16 Why don't we take a 15-minute recess and resume at
17 2:35.

18 We'll start addressing the final jury instructions. I
19 don't think we're going to be able to resolve everything today.
20 I think we can make some progress. And I have some questions
21 for all of you about that.

22 Thank you.

23 (A recess was held.)

24 (Court reconvened after the recess as follows:)

25 THE COURT: Please be seated.

1 Well, this claim construction issue is difficult. It's
2 close. But I'm going to go with my tentative view that you need
3 to know for purposes of the trial.

4 So I will try to get an order out tomorrow. Let me
5 give you claim construction now so you have something to work
6 with in preparing your witnesses and also the jury notebooks.

7 So I think this requires a revision in the language.
8 But I think of the meaning of Judge Andrews' original
9 construction of the number eleven representing the data for the
10 field of view and a pictorial representation having one or more
11 sections.

12 And Paragraph C under that, the Court's construction
13 would now read, "Providing the data necessary for displaying a
14 field of view in a pictorial representation having one more
15 sections. However, the method of Claim 1 does not include the
16 final step, displaying the visual data image of the user, using
17 the hardware of the display device or using the generic graphic
18 software or firmware associated with that display device."

19 I'll read it once more to be sure you have it.

20 "Providing the data necessary for displaying the field
21 of view in a pictorial representation having one or more
22 sections. However, the method of claim does not include the
23 final step of displaying the visual data image of user using the
24 hardware of the display device or using generic graphic software
25 or firmware associated with that displace device."

1 Are there any questions about that?

2 MR. PARTRIDGE: No. That's understandable, your Honor.
3 Thank you. That's helpful.

4 THE COURT: Mr. Snyder?

5 MR. SNYDER: No questions, your Honor.

6 THE COURT: Thank you very much for all your work in
7 helping me with that.

8 Let's turn now to the final jury instructions.

9 I know some of these are going to affect how you
10 present your case. We may not get through all of them. Let's
11 be sure that we get through those that are necessary for that
12 purpose.

13 The first one that I have is on Page 9. And there at
14 the bottom of the page, I'll go with Google's proposal, every
15 step in the claim requires.

16 Is there going to be an agreement that some of the
17 steps of the method are performed by Google or is there a
18 dispute as to more than E and F?

19 MR. PARTRIDGE: Your Honor, if I may? Could you say
20 that again? I had trouble hearing it.

21 THE COURT: Yes. I said is there a dispute about the
22 performance of the steps of the method other than E and F?

23 In other words, is it possible to tell the jury that
24 there's agreement that some of the steps are performed, and
25 there's an issue concerning whether E and F are performed?

1 MR. SPEARS: I believe that would be for Google to
2 speak to it.

3 MR. SNYDER: Your Honor, our defense will not be
4 limited to E and F. We will need to consider the Court's new
5 claim construction. There may be some steps that we can agree
6 are not being challenged by Google.

7 But at this point, I know it will go beyond E and F.

8 THE COURT: Why don't we leave it this way.

9 Why don't you be prepared to include in the post-final
10 jury instructions what you do dispute so we can focus the jury
11 on what they should be deciding and not having them concern
12 themselves with other steps of the methods which aren't in
13 dispute.

14 MR. SNYDER: Understood, your Honor, yes.

15 THE COURT: The next one I have is 9a on Page 12.

16 There's a bracket here.

17 "(ACI Proposal; by distributing the accused Google
18 Earth products and New Google Maps)".

19 What's the matter with that?

20 MR. SPEARS: Your Honor, I think we can short circuit
21 this.

22 At the point that you were headed with claim
23 construction, it becomes an actual order of the Court. We're
24 going to withdraw our claims of induced infringement. They
25 won't be in the case any more.

1 And I anticipate that we'll need to make some minor
2 changes in the preliminary instructions, but it will be
3 perfectly clear to you that they just disappeared.

4 THE COURT: Okay.

5 MR. SPEARS: One point I'd like to go back to, while
6 I'm up here.

7 With respect to the point at the bottom of Page 9.

8 Did I hear the Court say that it was going to go with
9 Google's proposal and instruct that every step in the claim has
10 to be in required order?

11 THE COURT: Yes.

12 MR. SPEARS: Our understanding is that's counter to the
13 operative presumption that generally we don't construe claims,
14 steps of the method claims to be performed in order.

15 THE COURT: I thought that was part of Judge Andrews'
16 claim construction.

17 Am I wrong?

18 MR. SPEARS: No. That was not part of Judge Andrews'
19 claim construction. Judge Andrews' claim construction was
20 directed to a very narrow issue concerning the order of
21 operation the dividing and requesting substeps of Step F.

22 Judge Andrews has never addressed that issue, because
23 the parties did not raise to him whether the main steps A, B, C,
24 D, E, F and G need to be performed in order.

25 The operative presumption under Altiris is that,

1 indeed, they did not.

2 THE COURT: Okay. Mr. Snyder?

3 MR. SNYDER: My partner, Ms. Simmons, will address
4 this.

5 MS. SIMMONS: Your Honor, actually, we do believe that
6 this was covered by Judge Andrews' Order, which was repeated, I
7 believe, in your Order from May 16th that the steps do need to
8 be performed in order.

9 And I don't know that it's been in dispute, because I
10 think everybody has worked under the assumption that the steps
11 do need to be performed in order.

12 THE COURT: Can you point me to where that is in Judge
13 Andrews' claim construction?

14 MS. SIMMONS: It was in your Order on Page 3, Docket
15 382. Let me just see if I can get the cite to Judge Andrews'
16 Order.

17 Sorry. One second.

18 (Pause)

19 I would refer the Court in Judge Andrews' memorandum
20 opinion to Section 12, which appears on Page 17.

21 And here it makes clear that with respect to this
22 particular step, there is a dispute as to whether the dividing
23 and requesting has to be performed in the same order.

24 That's the dispute that Judge Andrews resolved.

25 There was no dispute every presented as to whether the

1 main steps, A through G, need to be performed in the recited
2 order. And Google has never taken that position in this case.
3 And Judge Andrews has never found that those steps, A through G,
4 need to be performed in order.

5 MR. SPEARS: And the steps that he's referring to are
6 the dividing and requesting substeps of Step F.

7 THE COURT: Well, okay. I'm going to have to look at
8 this again.

9 MR. SPEARS: Okay.

10 MS. SIMMONS: Your Honor, if I could have one final
11 point on that?

12 THE COURT: Sure.

13 MS. SIMMONS: The claims themselves require, if you
14 read the claims, the necessary predicate. So if you go through
15 the claims, there is no way they could be read out of order.

16 THE COURT: Wait, wait. I'm inclined to think that's
17 right.

18 MR. SPEARS: This is a brand new claim construction.
19 If you refer back to the original claim construction brief
20 submitted by the parties, you will see not nary a hint of this
21 argument by Google.

22 Moreover, the experts, none of the experts have
23 addressed order of operation with respect to Claims A through G.
24 Neither their expert nor ours, for the simple reason that no
25 such construction was ever advanced to be resolved by Judge

1 Andrews.

2 THE COURT: I get you.

3 The next one I have is on Page 14.

4 And I propose to change the language of the ACI
5 proposal to read as follows.

6 "Patents issued by the PTO I presume to be valid, but
7 not all patents that are issued by the PTO are, in fact, valid.
8 You may find the patent invalid if Google establishes necessary
9 facts by clear and convincing evidence."

10 MR. SPEARS: That's acceptable to ACI, your Honor.

11 MS. SIMMONS: We also approve, your Honor.

12 THE COURT: And then on Page 15, I'm not sure that I
13 understand the dispute that is reflected in the middle of the
14 page there.

15 MR. SPEARS: This dispute has some history, your Honor.

16 And this basically relates to what we are going to call
17 the prior art references that the jury is going to hear about.

18 THE COURT: Just to short circuit this, I postponed the
19 decision until whether I was going to instruct the jury that
20 some of these things didn't qualify as prior art references.

21 Is this just a marker for that?

22 MR. SPEARS: This is a completely separate issue, your
23 Honor.

24 THE COURT: What is it?

25 MR. SPEARS: Throughout the proceedings in this case,

1 their expert has referred to these references as Sauter, Leclerc
2 and Fuller.

3 It's in his expert report and it's how he testified in
4 his deposition. And now they want to come in at trial and give
5 them a completely different name.

6 So if their expert starts talking about the T_Vision
7 paper, the SRI Technical Note, and the MAGIC report, to
8 cross-examine him on his prior testimony, and his expert report
9 was executed under oath, so it is prior testimony.

10 We've got overcome to this hurdle, because the language
11 in his prior testimony is not the language that he's going to be
12 using when he testifies in response to these references.

13 THE COURT: Okay. I get the point.

14 Let me hear from the other side.

15 MS. SIMMONS: Your Honor, we simply propose using the
16 names that are descriptive of what the prior art reference is to
17 assist the jury in keeping track of everything.

18 Our concern was that there would be a lot of peoples'
19 names that will be floating about and using a name that is
20 descriptive or taken from the title of the actual reference.

21 We thought would help the jury to understand better.
22 And we're certainly not going to argue that our expert can't be
23 impeached based on the switch of the names.

24 THE COURT: Well, what you're proposing is that your
25 expert is going to be using this terminology in his direct

1 testimony?

2 MS. SIMMONS: Yes, your Honor.

3 THE COURT: I think they're entitled to do that.

4 So we'll use the same terminology that Google uses in
5 the testimony of its experts. And, if necessary, we'll tell the
6 jury that the four references is the same MAGIC report or
7 vice-versa.

8 MS. SIMMONS: Thank you, your Honor.

9 THE COURT: Page 16. I found the proposed instructions
10 a bit confusing insofar as public use defense is concerned.

11 If I understand correctly, there are basically three
12 invalidity defenses here. There is anticipation, obviousness,
13 and there's public use.

14 If I understand the cases correctly, a public use can
15 also create a piece of prior art that can be used for an
16 obviousness analysis.

17 Do counsel agree with that way of saying it?

18 MR. SPEARS: Yes, your Honor.

19 MS. SIMMONS: Yes, your Honor. And for anticipation as
20 well.

21 THE COURT: I don't understand anticipation.

22 If it is public use, it's invalidating.

23 Why is it necessary to always describe it as
24 anticipation?

25 MS. SIMMONS: Is your Honor proposing that the public

1 use would render -- would just be clarified as invalidating, as
2 opposed to obvious versus anticipation?

3 THE COURT: Yes. What I was proposing is that the
4 instructions be written in such a way that the jury is told that
5 there's three defenses.

6 There's anticipation, there's obviousness, and there's
7 public use. And the public use could also be used as prior art
8 in the obviousness analysis.

9 MS. SIMMONS: I guess I'm not understanding why it
10 would be limited to the obviousness analysis.

11 THE COURT: The public use by itself would be
12 invalidating.

13 MS. SIMMONS: Understood.

14 THE COURT: I think it's just confusing to talk about
15 it as anticipation.

16 MS. SIMMONS: Understood. Understood.

17 THE COURT: So if you could all get together and clear
18 that up.

19 MR. SPEARS: I think we can do that, your Honor.

20 The other point of disagreement with ACI and Google
21 deal with what are the aspects the public use that the jury
22 needs to be instructed on.

23 I believe we can't have an intelligent conversation
24 about that until the evidence is in.

25 THE COURT: Until?

1 MR. SPEARS: Until the evidence is in.

2 THE COURT: Okay. Let's postpone that.

3 On Page 17, I'm going to adopt the Google proposal to
4 call these references instead of publications.

5 And then, again, I guess it's under Item 13, that's
6 just a question of terminology that we resolved earlier, right?

7 MR. SPEARS: Exactly.

8 THE COURT: Okay. Item 16 on Page 21.

9 Is it ACI's position that the only infringement that is
10 of the second reissued patent and that there are intervening
11 rights before that?

12 MR. HAWES: Your Honor, that is not our position.

13 But in order to keep that issue -- keep that issue out
14 of the case and simplify it, we have only asked for damages
15 since the July 13th, 2010 date.

16 THE COURT: Well, that's the date of the second
17 reissue.

18 MR. HAWES: It is. And, so, we thought we could
19 simplify the case if our expert only calculated the damage model
20 based on sessions started on that date.

21 And I believe the plaintiff -- I'm sorry -- your Honor,
22 it's actually the first reissue.

23 THE COURT: The first reissue.

24 MR. HAWES: Then there is a second.

25 We have not asked for -- our only damage model is for

1 sessions occurring on or after that date.

2 And as plaintiff, we believe we can ask for damages for
3 the time frame that we're asking for damages.

4 THE COURT: Why does Google want the 2008 date? Does
5 this relate to the dispute about the hypothetical negotiation?

6 MS. SIMMONS: It does, your Honor.

7 So we're happy for the plaintiff to limit the damages
8 period.

9 THE COURT: I would have thought so.

10 MS. SIMMONS: The problem is, as your Honor anticipated
11 with the hypothetical negotiation date, which by law is supposed
12 to be set at the time of the first infringement.

13 And as you'll note on Page 22, we've added an
14 instruction about that.

15 Google Earth was released in June of 2005. That,
16 therefore, should be the date of first infringement -- I'm sorry
17 -- the date of the hypothetical negotiation.

18 THE COURT: Well, but you certainly don't want to tell
19 the jury to start awarding damages from an earlier date, right?
20 You do want the 2010 date in here under 16?

21 MS. SIMMONS: I suppose that that's okay, as long as
22 the jury understands that the relevant period for the
23 negotiations and damages that could have been sought could go
24 back further, because the hypothetical negotiation should have
25 been in 2005.

1 THE COURT: Let's address that.

2 I mean, you certainly don't want an earlier date for
3 the award of damages.

4 So your theory is what, the original patent was issued
5 in 2000, and the infringement began in 2005, and that should be
6 the date of the hypothetical negotiation?

7 MS. SIMMONS: That's correct. That's when Google Earth
8 was released.

9 THE COURT: Okay. Let's hear from ACI.

10 MR. HAWES: So, your Honor, we have only asserted and
11 only are asking for damages with regard to the claims of the
12 first reissue. And there was a claim amendment in the first
13 reissue in order to reduce the number of issues in this case and
14 keep an appellate issue from being present.

15 We just said, we're going to ask for damages based on
16 the claims on the first reissue. And we're not going to try to
17 -- we're not going to seek to prove whether or not we ought to
18 be able to go further back into those claim amendments were
19 insubstantial.

20 We just -- we won't even ask for that. All we're going
21 to ask for is damages for the claims of the first reissue.

22 THE COURT: Yes. But I don't think that by picking a
23 particular damages date, you can fix the date of the
24 hypothetical negotiation by doing that.

25 If the claims were identical in the originally issued

1 patent, as in the first reissue, it seems to me that they have a
2 point. The hypothetical negotiation should be, you know,
3 immediately before the first patent.

4 MR. HAWES: So, your Honor, first of all, I would like
5 to say that we have not accused the Google Earth product that
6 was available in 2005. It's not among the accused products.

7 But, secondly, I would point out that these claims are
8 not identical. So if we had wanted to go before 2010, we would
9 have needed -- it was our burden to say, hey, these claims are
10 not substantially different under the Section 252 test.

11 We did not attempt to do that. We said, we're just
12 going to live with the 2010 date. That's the claim that we're
13 going to seek to enforce.

14 We have never raised or attempted to. And it's not
15 that the claims are identical. They are not.

16 THE COURT: Has either side found any authority about
17 this situation?

18 I have never seen before or heard of where there is a
19 question as to whether the hypothetical negotiation should be
20 the date of the original patent or reissued patent.

21 MR. HAWES: We did not, your Honor. We did not find
22 authority on point.

23 What we did find was authority that, one, it was our
24 burden if we wanted to go forward with regard to seeking the
25 earlier date, that was our burden.

1 And, two, that the plaintiff is allowed to determine
2 how much -- you know, in making a claim, the plaintiff is
3 allowed to determine how much of the damages they are going to
4 seek.

5 And we believe, based on that law, that we ought to be
6 able to seek the damages for the claims in the first reissue and
7 that we also are able not to seek to show that they are not
8 substantially different.

9 But your Honor, I don't have a case on point right now.

10 THE COURT: What's Google's response to the point that
11 the infringing method, accused infringing method, was different
12 in June 2005?

13 MS. SIMMONS: Your Honor, to the extent the claims are
14 different at all, Dr. Castleman, plaintiff's technical expert,
15 testified that the differences were immaterial.

16 THE COURT: Immaterial to what?

17 MS. SIMMONS: To the infringement analysis.

18 THE COURT: Any differences between the 2005 Google
19 Earth and the 2010 Google Earth?

20 MS. SIMMONS: No. To the different patents -- I'm
21 sorry -- to the original patent versus the later patent.

22 THE COURT: I'm not asking about that.

23 I'm asking about whether the product, 2005 Google
24 product, is the same or materially different from the 2010
25 Google product?

1 MS. SIMMONS: I don't know that there has been any
2 testimony as to the changes from 2005.

3 The accusations in the Complaint go back to 2008. The
4 statutory, the six years prior to the filing date. I believe
5 there has been testimony at least as far as back as 2008.

6 The concern that Google has about this, to be candid,
7 is that the plaintiff shouldn't be allowed to move the
8 hypothetical negotiation to avoid a laches problem, which I
9 believe is what's happening.

10 THE COURT: I don't disagree with that.

11 It's difficult for me to resolve the question right
12 now.

13 For the moment, I'm going to assume that the original
14 claim, the claim after the first reissue, are not materially
15 different for purposes of the hypothetical negotiation.

16 But there is a question of whether the product existed,
17 which product existed at that time, which is substantially the
18 same as the 2010 product.

19 I think that I -- I think the only way to deal with
20 this is to allow the parties to put in expert testimony as to
21 what the hypothetical negotiation date is. And based on that
22 testimony, to resolve the issue after the evidence comes in,
23 because I don't think I know enough now about the similarity
24 2005 and 2010 product.

25 I mean, I don't think you can have a hypothetical

1 negotiation in 2005, about a different product that wasn't
2 introduced until, let's say, 2010.

3 MS. SIMMONS: Understood.

4 THE COURT: Okay.

5 MR. HAWES: Understood, your Honor.

6 THE COURT: My next item here -- unless I skipped
7 something -- I'm on 23.

8 ACI says, well, whether the -- what's the point of
9 bracketed material in 4?

10 MR. HAWES: Your Honor, I'm happy to address that.

11 There was an issue -- another issue at the bottom of
12 instruction 17.

13 THE COURT: 17?

14 MR. HAWES: Well, I'm --

15 THE COURT: Let's go back.

16 MR. HAWES: Okay.

17 Well, I'm inclined to adopt ACI's proposal here rather
18 than Google's proposal.

19 So why don't you put that in the draft?

20 MR. HAWES: Yes, your Honor.

21 Now would you like me to address that next point?

22 THE COURT: Yes.

23 MR. HAWES: So, your Honor, in the Georgia-Pacific
24 factor it gives two examples.

25 Whether they are competitors and then whether they are

1 inventor and promoter.

2 Those are two data points for the jury to use in an
3 assessing the relationship between Google and ART+COM. Google
4 has kind of arbitrarily removing one of those points and leaving
5 the other one there.

6 All we ask is that both of the examples that the
7 Georgia-Pacific factors give for what kind of relationship there
8 may be, be included.

9 THE COURT: Well, I don't have the Georgia-Pacific
10 factors in front of me.

11 Can you read Item 5 from the jury instructions? Do you
12 have it there?

13 MR. HAWES: I believe ours, except for the change of
14 plaintiff and defendant, is the language in Georgia-Pacific.
15 And it does -- Georgia-Pacific does end with, "or whether they
16 are inventor and promoter."

17 THE COURT: I'm not sure I understand what that means.
18 What is your understanding?

19 MS. SIMMONS: Your Honor, that was our same concern.
20 It's not even explained in a way that the jury would understand
21 what it means.

22 And, in addition, there is no evidence that there is
23 any promotion or argument that Google somehow promoted an
24 invention of ACI.

25 MR. HAWES: Your Honor, on that, there is no evidence

1 that we are competitors in the same territory and the same line
2 of business.

3 So if that's Google standard, we should just take out
4 this entire factor.

5 THE COURT: Well, that's a problem that I have with
6 some of this boilerplate. And I haven't gone through this.

7 You can see from the Stragent case, I insisted that the
8 boilerplate had nothing to do with the evidence coming out.

9 So, again, I'm going to want to do that with respect to
10 these Georgia-Pacific factors when we get to the conclusion of
11 the evidence. And if there isn't any evidence about a
12 particular factor, I'm not going to instruct the jury about it.

13 So let's wait until then and see if we have any
14 evidence.

15 MR. HAWES: Can I make a proposal that might simplify
16 it, your Honor?

17 THE COURT: Yes.

18 MR. HAWES: Could we just make it the commercial
19 relationship is between ACI and Google?

20 THE COURT: Is there a relationship?

21 MR. HAWES: There were discussions.

22 THE COURT: Why don't you put that in a draft and see
23 where we are.

24 MR. HAWES: Yes, your Honor.

25 THE COURT: We're now at Item 11 at the top of 24, is

1 that right?

2 MR. HAWES: That's correct, your Honor.

3 THE COURT: What's the difference between the two?

4 MR. HAWES: Your Honor, we used the language from
5 Stragent, which says realizable profits, which we think is
6 important given our damages model. And that it should be
7 credited.

8 And Google is using "a portion of the profit that
9 arises."

10 And we think it is an important difference in view of
11 the damages model and the extent to which Google credited
12 certain revenue to Google Earth.

13 THE COURT: All right.

14 Why don't you put the ACI proposal in the next draft.

15 And when we get to the end of this, you'll have some
16 opportunity to object. I'm just trying to give you some
17 guidance for preparing the next draft.

18 Why don't you use the ACI proposal.

19 MR. HAWES: Understood, your Honor.

20 THE COURT: What's going on at the bottom of 24 here?

21 MR. HAWES: Your Honor, we believe this is repetitive
22 with Instruction 20, but it's Google's proposal, so I will let
23 them speak to it.

24 MS. SIMMONS: Your Honor, the instruction at the bottom
25 of 24, it's true it does cover the same material that is covered

1 in 20, but it's relevant to the factors that are being
2 considered. Particularly, the one we just discussed, No. 11.

3 We think it's important for the jury to understand,
4 particularly given the concerns that Mr. Nawrocki will be
5 drawing on revenue sources that aren't tied back to Google Earth
6 or any of the other accused products.

7 We want to make sure that the jury understands, as it's
8 considering this, that the award must be based on an incremental
9 value that is --

10 THE COURT: Let's include this in the final instruction
11 in the Google proposal.

12 Now, with respect to 25, I think Google's proposal is
13 wrong in saying it's capped by an incremental profit.

14 We have a couple of recent cases that said that's not
15 the case.

16 If I leave out the capped, "Incremental Profit," is
17 there any other difference between the two proposals?

18 MR. HAWES: And, your Honor, I believe the last
19 sentence of Google's is a significant difference, because it's
20 actually an instruction by the Court for the jury to consider
21 the single to actually set forth.

22 THE COURT: I'm not going to include that.

23 MR. HAWES: I think they are very close once you take
24 those two things out.

25 But I would have to double check, your Honor. We can

1 work that out.

2 THE COURT: If Google wants to include in this case
3 that Google contends that use of single data point as a
4 non-infringing alternative, if that is the main point that you
5 are making, we can include that.

6 MS. SIMMONS: It is. Just so the jury understands.

7 THE COURT: Well, I'm not going to tell them. You can
8 tell them that's what you contend.

9 THE COURT: That brings us up to Page 27?

10 MR. HAWES: I believe so, your Honor.

11 My concern with Instruction 20 now is that I think it's
12 repetitive of the language that we added in the factors list.

13 THE COURT: Okay. Well, I'm not going to deal with
14 repetitiveness today.

15 MR. HAWES: Okay. Then the only difference between the
16 proposals is that we felt for a method claim, the proposal has
17 Google has is from Stragent, but that was not a method claim,
18 your Honor. And we tried to adopt it, so that it was
19 appropriate for a method claim, where it's more about the
20 functionality than it is components or features.

21 I think the language is similar. It's just a question
22 of do you focus on functionality or do you focus on components
23 and features?

24 THE COURT: What's Google response to ACI?

25 MS. SIMMONS: The term "functionality," it's too broad.

1 It's not limited to the specific aims claimed method, so
2 functionality is displaying Earth?

3 I don't know. Our concern is that it ends up being too
4 broad and that it reaches beyond what the actual specific
5 claimed method is, and the feature that is accused of
6 infringing.

7 THE COURT: Why don't you change it to say, it covers
8 -- the performance of the accused method damages must be based
9 upon value of the accused method contributes to the overall
10 revenues or something like that?

11 MR. HAWES: Your Honor, can I propose that we replace
12 "functionality" with "method," so there would be damages tied to
13 a patented method?

14 And then in --

15 THE COURT: Well, it can't say kind of method. I mean,
16 when the claim covers the method --

17 MR. HAWES: I was looking at the title of the
18 instruction, your Honor, "Damages Tied to Patented Method."

19 But inside we could say, when the claimed invention
20 covers some of the methodology of the accused product, damages
21 must be based upon the value of that.

22 THE COURT: That's confusing. It needs to refer to the
23 claimed method.

24 In this case, the value of the product is based on
25 things other than the performance of the accused method of the

1 patented method, blah, blah, blah.

2 MR. HAWES: I'm happy to take a shot at that and see if
3 we can agree on that.

4 We'll see if we can do something in line with what
5 you're saying, your Honor.

6 THE COURT: Okay. Thank you.

7 THE COURT: Now, what is Google's proposal as to what a
8 small saleable unit is here?

9 MS. SIMMONS: Google Earth.

10 THE COURT: And what does that mean?

11 That you -- they can't include any revenues coming from
12 anything else?

13 MS. SIMMONS: Well, the last paragraph is the paragraph
14 that we tried to address -- used to address that issue. And
15 this was addressed by the Court previously in a previous
16 argument.

17 To the extent they are going to attempt to tie other
18 revenue sources back to the value of using the claimed invention
19 in Google Earth, they can only do so if they can show that those
20 drive the demands for the unaccused products. There had to be
21 some tie back --

22 THE COURT: No. I don't think it has to drive demand
23 for the other products. I think if it contributes to the demand
24 for the other products, there is an argument for getting royalty
25 on some of that revenue.

1 To the extent -- I mean, to the extent that other
2 revenue is generated by the use of this feature, then they are
3 entitled to include that in the revenue base, a portion of that
4 revenue base to apply a royalty.

5 MR. SNYDER: And we would agree with the proposal, if
6 that's the way your Honor is leaning, that the instruction
7 specify that the other revenue sources have to specifically rely
8 upon the accused product and that there must also be a proper
9 apportionment, based on your Honor's previous Order.

10 THE COURT: Well, I agree with the second part of that.
11 There has to be a proper apportionment.

12 I don't agree with the first part of that.

13 I think if Google Earth makes a contribution to the
14 other revenue stream, that you can apportion a part of that
15 revenue stream to Google Earth.

16 That would be my view. It all depends on whether they
17 can prove that.

18 Does that give you some guidance as to how to redraft
19 this?

20 MS. SIMMONS: It does. I assume I would simply refer
21 back to your Honor's Order that they use the language to the
22 extent that the various revenue sources rely upon the accused
23 product, and that language would be acceptable to Google as
24 well.

25 THE COURT: Well, I don't think the jury can understand

1 what rely upon means in that context. I think the other revenue
2 sources are increased as a result of the Google Earth product or
3 something like that.

4 MS. SIMMONS: Do you want to meet-and-confer on that as
5 well.

6 MR. HAWES: We can. This might be something that we
7 deal with once the evidence is in to see what happens.

8 THE COURT: Okay. Why don't you see if you can come up
9 with something tentatively. Or if there is a difference, we can
10 address it later.

11 I think the drives the demand is not the right
12 formulation.

13 MS. SIMMONS: Understood.

14 MR. HAWES: Understood, your Honor.

15 I believe that was all of them, your Honor.

16 THE COURT: Okay. I think for the moment that's all I
17 have.

18 Does either side have anything more that you want to
19 discuss today?

20 THE COURT: I guess there's the verdict form.

21 Is there anything different about the verdict form that
22 we ought to talk about?

23 MR. PARTRIDGE: Your Honor, the verdict forms are quite
24 different. And I would suggest that we simply wait completely
25 on that, because I think you'll be able to tell, once you hear

1 the evidence, whether or not the more complicated verdict form
2 that Google proposes compared to the simpler one we have is
3 appropriate. And, in particular, part of the complication is
4 the separation of each of the different Google Earth products.

5 I think the evidence is going to show that the
6 technology is the same across the board and there is no need for
7 the extra complication.

8 But I think when you hear all the evidence, it's going
9 to pretty easy for you to choose as between these verdict forms.

10 MS. SIMMONS: I agree, your Honor. I think that's
11 fair.

12 THE COURT: Okay. Now, what I'd like you to do is
13 prepare a new draft of the final jury instructions and to have
14 that available Monday morning, is that feasible?

15 MR. PARTRIDGE: Yes, your Honor, I think it is.

16 MS. SIMMONS: Yes, your Honor.

17 THE COURT: That would be helpful.

18 Do try to leave out the boilerplate that doesn't have
19 anything to do with this case. I think it's very confusing to
20 the jury.

21 Anything else we should be dealing with today?

22 MR. PARTRIDGE: Your Honor, the only thing I would add,
23 I guess we'll see you at 8:30 on Monday morning --

24 THE COURT: Right.

25 MR. PARTRIDGE: -- to deal with any issues that we

1 have.

2 THE COURT: Yes.

3 MR. PARTRIDGE: The one concern I have, and I'm sure
4 this is Mr. Snyder's experience as well, is that sometimes at
5 the first day of trial of there may be more guidance that we
6 need. And then the next number of days it's a little easier to
7 deal with the issues, because we know how you're approaching
8 things.

9 So with respect to demonstratives for openings, and
10 demonstrative for witnesses, and the exhibits, my only concern
11 is whether or not that 30 minutes will be enough and whether we
12 should do 45 on Monday morning. Just to be safe in case there
13 are more issues than 30 minutes will allow, because I'd really
14 like -- and I know your Honor wants to get the jury in the box
15 than and get the case started at 9:00 o'clock sharp.

16 MR. SNYDER: We will, of course, try to reduce the
17 number of objections that the Court has to resolve Monday
18 morning.

19 But it is true that if we don't get -- we don't know
20 how many there will be and we'll be guided by the Court's
21 schedule.

22 If you want us here at 8:15, we'll be here. If you say
23 8:30, we'll be here.

24 THE COURT: Let's do 8:30. If we have to keep the jury
25 waiting for a few minutes, we'll do that.

1 MR. SNYDER: Thank you, your Honor. We don't have
2 anything further.

3 THE COURT: Thank you very much.

4 I will see you at 8:30 on Monday morning. Again, I
5 think counsel are working well together and I appreciate that.

6 (The proceedings adjourned at this time.)

7 * * * * *

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25